(18,246.)

Supreme Court of the United States.

October Term, 1901.

No. 393.

HANNAH SCHAEFER, Plaintiff in Error. vs. JULIUS WERLING, HENRY DRAPER, and MARTIN B. SCHAEFER.	In Error to the Supreme Court of the State of Indiana.

Brief of Samuel M. Sayler, of Counsel for Plaintiff in Error.

STATEMENT OF CASE.

The following is a short statement of the facts involved in this appeal:

Hannah Schaefer, the plaintiff in error, is now, and from September, 1892, has been the owner of Lots Nos. 11, 13, 14, 15 and 16 in Schaefer's Addition to the City of Huntington, Indiana. William Street in said city runs along the entire front line of said lots. Said street extends from Charles Street to the corporate limits of the City of Huntington and ends in a neighborhood road,

which runs about three-fourths of a mile from the city limits, ending at three or four slaughter houses. In September, 1892, a general desire was manifested among the residents along William Street to have it graded and graveled. A petition to have the street graded and graveled was prepared and presented to the City Council of the City of Huntington, and on the 10th day of July, 1893, the petition was granted and the street was ordered to be so improved, (Rec. p. 6.) The plaintiff in error was in favor of grading and graveling the street and, by her husband and agent, Martin B. Schaefer, signed such petition. After the improvement was ordered some of the owners of lots abutting on the street became dissatisfied with the improvement as ordered, and petitioned the Common Council "to order the street paved with brick, "the cost of which should be charged against the abut-"ting property, except for street and alley crossings, "and to be paid for under the Barrett law system." This petition was presented to the City Council on August 4th 1893. At the same meeting of the City Council a remonstrance was presented which was signed by a number of property owners along the street, representing in all 2868 feet frontage out of a total frontage of 4460 feet. (Rec. p. 9.) The plaintiff in error, her husband, M. B. Schaefer, acting for her, was one of the remonstrators. This remonstrance availed nothing and the improvement was ordered in accordance with the provisions of the law of March 8th, 1889, commonly known as the Barrett law, and amendments thereto up to time of passing the resolution therefor, except in the following particulars:

First. The City Council, after ordering notice to be given to property owners that objections would be heard on the evening of September 25th, 1893, as to the necessity of said proposed improvement, refused to hear any of the objections of the plaintiff in error, although she was present by her attorneys with written objections to the necessity of said improvement, and on motion of Mr. Levy, a member, the Common Council treated her objections as a communication and ordered it placed on file. (Rec. p. 25).

Second. On the afternoon of September 26th, 1893, at 2:50 o'clock, the plaintiff in error filed in the office of the City Clerk in the City of Huntington her written protest against the paving of said street with brick, setting

forth four grounds of protest, all of which appears fully on pages 26 and 27 of the Record. This protest was filed before the contract was let to the defendants in error, Werling and Draper.

Third. The plaintiff in error still further protested against the improvement of said street with brick, going to the contractors, the defendants in error, Werling and Draper, and saying to them that she would not pay for the same for the reason that the improvement was illegal and void. See 3rd paragraph of the answer, Record, page 74, the truth of which is admitted by the demurrer of the defendants in error.

Fourth. The Common Council, when the final estimate was before it, refused to hear any witnesses except owners of real estate abutting on William Street and refused to make any record of such refusal.

The plaintiff in error has publicly and persistently objected and protested from the beginning until now against the improvement of William Street by paving it with brick.

The defendant in error, Martin B. Schaefer, was a party to this suit and a judgment was rendered below in his favor, for costs. Not joining in the appeal of the plaintiff in error, he is made a defendant herein so that all of the parties to said suit shall be parties to this appeal.

The material provisions of the Act of March 8th, 1889, and the amendments thereto under which law the said improvement was constructed are particularly set forth in Vol. 2 of Annotated Indiana Statutes Revision of 1894, and as follows:

4288. (E. S. 812.) PETITIONS FOR STREET IMPROVEMENTS. Precedure.—1. That when the owners of two-thirds of the whole line of lots or parts of lots in any city or incorporated town (and measuring only the front line of such lots as belong to such persons resident in such city or town) bordering on any street or alley consisting of one whole square between any two streets crossing the same, or if the common council of such city, or of the board of trustees of such town, deem it expedient for any reasonable distance less than one whole square or block upon any square or alley, shall petition the common council of such city or board of trustees of such town to have the sidewalk graded and paved, or the whole width of the street graded and paved, or for either kind

of improvement, or for lighting such streets according to the general plan of improvements in said city or incorporated town, or for constructing a sewer, the common council of such city or the board of trustees of such town may cause the same to be done by contract, given to the best bidder, after advertising for three weeks in some newspaper of general circulation published in the city or incorporated town, to receive proposals therefor, and the common council of such city, or the board of trustees of such town shall have the power to compel the owner or owners of a lot or a part of a lot on any street or alley, or upon any part of any street or alley, to repair the sidewalk in front of their respective lot or lots, and in case the owner or owners of any lot or part of a lot on any street or alley, or any part thereof, fail or refuse to repair the sidewalk in front of their lots, or if the owner be a non-resident of said city or town, or cannot be found, the common council of such city or the board of trustees of such town may cause such repairs to be made at the cost and expense of the owner or owners of such lot or lots; or if such sidewalk be dangerouse, the street commissioner or any officer of said city or incorporated town may cause such repairs to be made immediately, and the city or incorporated town shall have a lien on such lot or lots for the reimbursement to her of the cost of such improvement, and the common council of such city or the board of trustees of such town are hereby invested with full powers to pass by-laws and ordinances providing how and in what manner the repairs or improvements shall be made and in what manner the costs shall be assessed and collected from such owner or owners, and the manner in which the lien of the city or incorporated town for the expense incurred by her may be enforced against the lot or lots of such owner or owners, and the city or incorporated town may bring an action, by its attorney, in any court of competent jurisdiction to foreclose such lien as a mortgage is foreclosed, and in such action may recover, in addition to the amount of such lien and the cost of such proceedings, a reasonable attorney fee, for the use of its attorney, for enforcing such lien, and such property shall be sold without relief from valuation or appraisement laws and upon the sale of such property, if no other person bid, the amount of such judgment and all costs, the city or incorporated town may purchase said property for such judgment and all

costs, and if not redeemed within one year from the time of such sale, the sheriff shall issue to the holder of the certificate of sale a deed for such property, and such city or incorporated town, if such deed be issued to it, shall become the absolute owner of such property: *Provided*, That any city or incorporated town having a population less than ten thousand may, by a two-thirds vote of all of the members of the common council of such city or the board of trustees of such town, cause plank or gravel walks, of such dimensions as such council or such board of trustees may determine, to be constructed either upon the natural grade of the side-walk therein or any modification thereof established by such council or such board of trustees, and the cost and expense of any such improvement or repairs thereto shall be a lien upon the real estate fronting thereon, and shall be assessed and collected in the same manner as now perscribed by law for collecting assessments for improving streets, alleys, and sidewalks: *Provided, further*, That when the state of Indiana is the owner of property on or along the street or streets proposed to be improved, as hereinbefore provided, the common council of such city or the board of trustees of such town shall not contract for the execution of said improvements, involving the state in any liability, without first obtaining the written consent and approval of the auditor and treasurer of state, but such city or incorporated town may make such improvement at its own expense.

4289. (E. S. 813.) RESOLUTION OF NECESSITY—NOTICE TO OBJECTORS.—2. Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the size, kind, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the

line of said proposed improvement can make objections to the necessity for the construction thereof.

4290. (E. S. 814.) APPORTIONMENT OF COSTS—LIENS —SALE.—3. In all contracts specified in the preceding section the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the costs of any such sewer shall be apportioned among the lands, lots and parts of lots, benefited thereby, and according to such benefits without regard to the assessment for taxation of such property, and the city or incorporated town shall be liable to the contractor for the contract price of said improvements, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, or of the lot or parts of lots benefited by the construction of such sewer, shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, and for the construction of such sewer for the benefit of such lots or parts of lots thereby, and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided, and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any unplatted lands lying within the corporate limits of such city or incorporated town, the cost of such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement: *Provided, however,* That where such land is

subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order. Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting taxes, and shall not be divested by any judicial sale, and if such city or incorporated town shall fail, neglect or refuse to promptly enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates hereinafter mentioned may foreclose such lien or liens as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of said bonds and interest and all costs, a reasonable attorney's fee. The amount realized by the sale of any such property, or the payment of such assessment after the payment of the costs of such proceeding shall, to the extent of such assessment, with interest thereon, be applied pro rata to the payment of the then outstanding bonds or certificates herein mentioned without reference to the time of the maturity of the bonds or certificates. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund.

4292. (E. S. 816.) ESTIMATES—HOW PAID—LIENS.—5. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council of such city or the board of trustees of such town shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates

shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town, and the owner of the certificate or bonds hereinafter mentioned to secure to the city or incorporated town and such owners the reimbursement for such cost of improvement hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town.

4293. (E. S. 817.) FINAL ESTIMATE OF COSTS—REPORT OF ENGINEER.—6. When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching said improvement: *First.* The total cost of said improvement. *Second.* The average cost per running front foot of the whole length of that part of the street or alley so improved. *Third.* The name of each property owner on that part of the street or alley so improved. *Fourth.* The number of front feet owned by the respective property owners on that part of said street so improved. *Fifth.* The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground re-

spectively. *Sixth.* The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. *Seventh.* In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.

4294. (E. S. 818.) NOTICE OF HEARING—ASSESSMENTS —LIENS.—7. Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee appointed to consider such reports, and such committee shall make report to the common council of such city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement, which said amounts shall bear interest at the rate of six per cent. per annum from the time of the finding of the completion of said improvement by the common council or board of trustees, as mentioned in section 6 of this act. Should any one of such assessments exceed the sum of fifty dollars, then if the owner of the lot or parcel against which said assessment is made, may, if he, within two weeks after the making of such assessments, shall promise and agree, in writing, to be filed with the clerk of such city or town, and to be spread of record by him in consideration of the right to pay his or their assessment, or respective assess-

ments in installments, that they will not make any objections to illegality or irregularity as to their respective assessments, and will pay the same, with interest thereon, at the rate of not exceeding six per centum per annum, as shall by ordinance or resolution of the common council of such city, or board of trustees of such town, be prescribed and required, he or they shall have the benefit of paying said assessments in ten annual installments, as hereinafter provided. Any owner of any lot who has been assessed more than the sum of fifty dollars thereon for the cost of such improvement who will not promise and agree in writing as herein provided, and all other owners of lots or parcels wherein assessments less than fifty dollars have been made or have heretofore been made against any one lot or parcel, shall be required to pay his or their assessment in full when made, and the same may be collected according to the provisions of amended section 10 of this act, or the contractor or his assigns may forclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of such assessment, with interest, all costs and a reasonable attorney's fee. Whenever any payment shall be made upon any of such assessments, it shall be the duty of the treasurer, contractor or owner of the assessments, bonds or certificates or installments of assessments, as hereinafter provided, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment, and upon the payment of any bonds or certificates as are issued under this act they shall be surrendered to and cancelled by the treasurer; when bonds have been requested as aforesaid, then the common council of such city or board of trustees of such town shall cause the said assessment amounting to more than fifty dollars and bonds requested therefor to be placed upon the city or incorporated town tax duplicate and charged against the several lots or parcels of grounds as follows: Ten per cent. for each successive year for ten years, to which several amounts shall be added and placed on the duplicate, interest at six per cent. per annum, payable semi-annually, which shall be calculated from the time of the acceptance of the work by the common council or board of trustees, until the several allowances fall

due; and the first ten per cent. shall be due and payable when the first tax falls due, and is payable after such assessment is made; and said assessment, as made, together with the interest thereon, shall be a lien upon the several lots or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, or in such manner as the common council or boards of trustees, by ordinance, shall prescribe; and the law governing the collection of taxes shall, as far as the same is applicable, regulate and govern the collection of such assessment, and such assessment, and the proceeds arising therefrom, shall constitute a special fund for the payment of the costs of such street, alley and sewer improvement, and the bonds and certificates hereinafter mentioned and for no other purpose.

4295. ALL PERSONS MAY PAY BY INSTALLMENTS.—1. That the privilege now granted by law to persons assessed for the construction of street or alley improvements, or sewers, to pay the same in ten years in installments, if such assessment exceed fifty dollars upon any one lot, shall be extended to all persons, without regard to the sum assessed: *Provided*, They shall execute the stipulation waiving objections on account of illegality or irregularities in the proceedings of assessment, as is now required by law in case of assessments exceeding fifty dollars.

4296. (E. S. 819.) STREET AND SEWER BONDS—LIEN. —8. The common council of such city or the board of trustees of such town, for the purpose of anticipating the collection of such assessments, shall have power to issue street or sewer improvement bonds for the purpose of raising money with which to pay for such improvements made, and in issuing such bonds the common council of such city or the board of trustees of such town, shall be governed by the law now in force regulating the issuing of bonds by cities. The proceeds arising from said bonds shall be applied exclusively to, and appropriated and used for, no other purpose than the liquidation of the cost of the improvements in this act mentioned. Said bonds shall bear the name of the street or alley improved, or the sewer constructed, and shall be payable, in equal installments, out of the special fund hereinbefore provided in one, two, three, four, five, six,

seven, eight, nine and ten years from date, and shall bear interest not to exceed 6 per cent. per annum, payable semi-annually. In case such city or incorporated town has any money on hand belonging to any fund, which will not be used within the maturity of any such bonds, such city or incorporated town may invest such money in any of such bonds maturing before such money shall be needed. After the assessment, as herein provided, has been made by the common council of such city or the board of trustees of such town, no suit shall lie to restrain or enjoin the collection of such assessment, and the validity of such assessment shall not be questioned, and such bonds, when issued, shall transfer to the owner thereof all the right and interest of such city or incorporated town in and to such assessments and the liens thereby created, with full power to enforce the collection thereof by foreclosure or otherwise, under any of the provisions of this act. And all such bonds shall be an equal lien upon the property so assessed without priority of one over another.

4297. (E. S. 820.) CERTIFICATES TO CONTRACTOR—COLLECTING ASSESSMENTS—FORECLOSURE.—9. It shall be lawful for such city or incorporated town to provide by ordinance for the issuance of certificates or bonds to contractors, who, under contract with the city, shall have constructed any such improvement in payment therefor, each of which certificates or bonds shall bear the name of the sewer, street or alley improved, the time the same shall run, not to exceed ten years, the rate of interest the same shall bear, not to exceed six per cent. per annum, payable semi-annually, and such certificates and bonds shall transfer to the contractor and his assigns all the right and interest of such city or town to, in and with respect to every such assessment and the lien thereby created against the property of such owners assessed as shall avail themselves of the provisions of this act to have their assessments paid in installments, and shall authorise such contractor and assigns to receive, sue for and collect, or have collected, every such assessment embraced in any such certificate or bond, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act. And, if the city or county shall fail, neglect or refuse to pay said certificates or bonds, or to

promptly collect any of such assessments when due, the owner of any such certificates or bonds may proceed in his own name to collect such assessment and foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such bond or certificates and the interest thereon, a reasonable attorney's fee, together with the cost of such suit. Any number of holders of such certificates or bonds for any single improvement may join as plaintiffs, and any number of owners of the property on which the same are a lien, may be joined as defendants in such suit. And such bonds and certificates shall be equal liens upon the property for the assessments represented by such bonds or certificates without priority of one over another to the extent of the several assessments against the several lots and parcels of lands.

4298. (E. S. 821.) PRECEPT FOR SALE—APPEAL—SALE AND CONVEYANCE.—10. In case any of the owners of lots or parcels of grounds on which such assessments have been made shall fail, or refuse, for the space of twenty days after the date of the estimate to pay the amount thereof due by such person to such contractor, shall file his affidavit in the clerk's office of said city, stating that the whole or some part of said assessment remains unpaid, showing the amount paid and the amount due. that the estimate thereof has been duly made, and that the work estimated has been done according to contract, it shall be the duty of the clerk at the next or any subsequent meeting of the common council to report the said affidavit to the council, whose duty it shall be to cause a precept to issue for the collection of such assessment or any unpaid balance thereof, which precept shall be signed by the mayor and attested by the clerk, and sealed with the seal of said city, and shall set forth the name of the person against whom the assessment is made, the description of the lot or land on which it is made, the amount of such assessment and the date of the estimate, which shall be directed to the treasurer of such city, commanding him to make such assessment, or unpaid balance thereof, within ten days after receiving such precept, of the owner in whose name such assessment is made, which precept the clerk shall forthwith deliver to the treasurer, who shall serve the same by reading the same personally to such owner or by leaving a copy of

such precept at his last or usual place of residence; or if such owner be unknown, or not a resident of such city, then by publication for three successive weeks in a weekly newspaper printed and published in the city, briefly setting forth the facts of the estimate, the amount due, that the work has been done as contracted, the name of the person whose property is to be sold, the description of the property, and the date of the order of said precept by the said council, and giving notice that if such assessment be not paid within twenty days after publication he will proceed to make the same by levy and sale of the lot or lands whereon the same is assessed. Any owner of land or his representatives aggrieved by such precept may appeal therefrom, within twenty days after such demand or publication, to the circuit court of the county wherein such city is situated upon filing sufficient bond with the clerk of said city, conditioned for the payment of whatever judgment may be rendered against such appellant in said court, and such appeal shall stay all proceedings by such treasurer. And the trial of such appeal shall be conducted as other trials of civil causes are conducted in civil courts. *Provided*, That no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council. The clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a true and complete copy of all papers connected in any way with the street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds and other papers filed in said matter, which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule; and in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold and conveyed by the sheriff thereof as the said treasurer is hereinafter directed to sell and convey property liable to street improvements: *Provided*, That nothing herein shall be so construed as to prevent any person from obtaining an in-

junction upon the proceedings prior to the making of any such improvements. If no such appeal shall have been taken as aforesaid, it shall be the duty of such treasurer, within ten days after the expiration of said twenty days, to levy said precept upon the lot or land therein described, and to sell the same or so much thereof as may be necessary, to pay such assessment, with costs and charges. But before any such sale he shall give notice of the time and place thereof, by advertising the same for three weeks successively in a newspaper printed and published nearest to such lot or land, if any such be printed and published within the county wherein such city is situated, and by posting up written or printed notices thereof in at least three public places in said city. And every such sale shall be by public auction, and upon or near the premises, or in the city court room of said city, in the discretion of said treasurer; and no sale of said lot or land previous or subsequent to the date of such estimate, and subsequent to the date of such petition or determination of the common council to make such improvement without petition shall invalidate or affect any sale thereof in pursuance of this act. Upon the sale of any lot or land by virtue of such precept, and the payment of the purchase-money, the treasurer (or in case of his death or going out of office, his successor), shall execute, acknowledge and deliver to the purchaser a certificate of conveyance for the premises, which shall be valid and effectual to convey all the rights, title and interest of any such owner or purchaser from him as aforesaid, except as hereinafter provided, and shall be *prima facie* evidence of all the facts recited therein. In case the purchaser of any real estate under a precept, as aforesaid, having paid the purchase-money therefor, shall die before a certificate of conveyance, as herein provided, shall have been executed to him, the treasurer shall convey the same to the heirs or devisees of such deceased purchaser. The proceeds of any such sale shall be applied as follows, to-wit: *Firstly*, to the payment of such assessment, with interest thereon from the date of such estimate, and all costs accrued thereon by reason of said sale; and, *Secondly*, the residue of such proceeds shall be paid to the owner or his or her heirs or representatives, of such real estate, or, if unknown, it shall be paid into the city treasury: and such city shall at all times be responsible

to such owner, heirs or representatives for such residue. The purchaser under such precept shall hold such real estate subject to the lien of the unpaid part of its proportion of the whole cost of the improvement. The treasurer shall be entitled to a commission of five per cent. on the first hundred dollars, and three per cent. on any excess above that sum; but when the money is paid to him without sale, one-half commission only shall be received by him. For levying on the real estate and advertising the same, he shall receive one dollar; for personal demand for payment, twenty-five cents; for return of the precept, with his doings thereon, one dollar; for making certificate of sale on real estate, one dollar. He shall endorse on said precept the time of receiving the same, and, within three months thereafter, he shall make return thereof to the clerk, with his proceedings thereon. Any purchaser failing to pay the purchase-money shall be subject to the like penalties and proceedings as purchasers at sheriff's sale are by the laws of this state. The owner of any lot or land sold as aforesaid, or his agent or attorneys, heirs or representatives, may redeem the same at any time within one year after the day of sale, by paying to the purchaser, or to the city treasurer for the use of the said purchaser, or his heirs or assigns, the sum mentioned in his certificate, and the amount of all subsequent assessments paid by the purchaser, with fifty per cent. on the whole sum, and interest from date of purchase or time of payment: *Provided*, That infants, idiots, insane persons and *femme covert*, may redeem any such lot or land belonging to them, sold for assessment, as aforesaid, within one year from expiration of such disability. Claimants of a part of such land, or of any individual part of the same, may redeem the whole as others may redeem. If such owner, or other person on his behalf, shall fail to redeem such land within one year, as aforesaid, at the expiration thereof, and on production of the certificate of purchase, the treasurer shall execute to the purchaser, his heirs or assigns, in the name of the city, a conveyance of the real estate so sold, which shall grant in the grantee an absolute estate in fee-simple, subject, however, to all claims which the city may have thereon for assessments, or liens, or other incumbrances. Such certificate and final conveyance shall resemble, as nearly as may be, the certifi-

cate and conveyance for tax sales, and be *prima facie* evidence of all the facts recited therein.

ASSIGNMENT OF ERRORS.

The assignment of errors in this cause is as follows:

1st. That said court (The Supreme Court of Indiana), erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the original answers filed in said cause and by holding and deciding that the facts stated in said answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

2nd. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the first paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in first paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

3rd. That said court erred in sustaining the demurrer interposed by the plaintiff and defendants in error to the second paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 2nd paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

4th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 3rd paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 3rd paragraph of answer filed were not sufficient to constitute a defense to the cause action in the plaintiffs' complaint contained.

5th. That the court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 6th paragraph of the original answer filed in said cause and by holding and deciding that the facts in said 6th paragraph of answer filed were not sufficient to constitute

a defense to the cause of action in the plaintiffs' complaint contained.

6th. That the court erred in sustaining the demurrer interposed by the defendants in error to the 7th paragraph of the answer filed in said cause and by holding and deciding that the facts stated in said 7th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

7th. That the court erred in sustaining the demurrer of the plaintiffs and defendants in error to the 8th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 8th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

8th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 9th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 9th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

9th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 10th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 10th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

10th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 11th paragraph of the original answered filed in said cause and by holding and deciding that the facts stated in said 11th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

11th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 12th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 12th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs'

complaint contained.

12th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 13th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 13th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

13th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 13th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 14th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

14th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 15th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 15th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

15th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 16th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said 16th paragraph of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

16th. That said court erred in sustaining the demurrer interposed by the plaintiffs and defendants in error to the 17th paragraph of the original answer filed in said cause and by holding and deciding that the facts stated in said said paragraph 17th of answer filed were not sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

17th. That said court erred in failing to specifically consider and pass on each assignment of error of plaintiff in error.

18th. That said court erred in holding and deciding that the act of the General Assembly of the State of Indiana, approved March 8th, 1889, Acts of 1889, page 237, commonly known as the Barrett law, is constitutional,

and not obnoxious to any provision of the Constitution of the United States.

19th. That the said court erred in holding and deciding that the act of the General Assembly of the State of Indiana approved March 8th, 1889, Acts of 1889 page 237, commonly known as the Barrett law is not in contravention to, and obnoxious to the provisions of the fourteenth amendment to the Constitution of the United States.

20th. That the said court erred in not holding and deciding that the act of the General Assembly of the State of Indiana approved March 8th, 1889, Acts of 1889 page 237, commonly known as the Barrett law is in contravention to, and obnoxious to the provisions of the fourteenth amendment to the Constitution of the United States.

21st. That said court erred in overruling the petition of the plaintiff in error for a hearing of her said cause.

22nd. That said court erred in rendering judgment against the plaintiff in error in said cause upon the pleadings in said cause and that said judgment is contrary to law and the facts as stated in the pleadings in said cause.

CONSTITUTIONAL QUESTIONS INVOLVED.

Did the Supreme Court of the State of Indiana err in holding and deciding that the Act of the General Assembly of the State of Indiana approved March 8th, 1889 Acts of 1889 page 237, commonly known as the Barrett Law is constitutional, and not obnoxions to any provision of the Constitution of the United States?

2nd. Did the Supreme Court of the State of Indiana err in holding and deciding that the Act of the General Assembly of the State of Indiana approved March 8th, 1889, Acts of 1889 page 237, commonly known as the Barrett Law, is not in contravention to and not obnoxious to the provisions of the 14th Amendment to the Constitution of the United States?

3rd. Did the Supreme Court of the State of Indiana err in not holding and deciding that the Act of the General

Assembly of the State of Indiana approved March 8th, 1889, Acts of 1889, page 237, commonly known as the Barrett Law, is in contravention to and obnoxious to the provisions of the 14th Amendment to the Constitution of the United States?

4th. Was the assessment against the several lots of the plaintiff in error, having been made in accordance with the provisions of said Act of March 8th, 1889, coupled, however, with the denial to the plaintiff. by the Common Council of the City of Huntington, of the right to present any objections to the necessity of said street improvement, or to be heard on them, and coupled by the further denial, by the Common Council of the City of Huntington, when the final estimate was before it, of the right to be heard on the same by any witnesses except owners of real estate abutting on the street so improved, and the further refusal of said Common Council to make any record of such refusal, a taking and depriving the plaintiff in error of her property without due process of law, or a denial to her of the equal protection of the laws, or both?

BRIEF ANALYSIS OF THE LAW.

A brief analysis of the law, we submit, is as follows:

The Common Council can without petitition therefor, declare, by resolution the necessity for the improvment. (Sec. 2.)

The cost of a street paving improvement is estimated according to the whole length of the same per running front foot. (Sec. 3.)

The avowed purpose of the Barrett Law is to formulate a method by which public improvements can be made regardless of the objections or protests of property owners. It is predicted on the assumption "that as a rule property along the line of a street improvement will be equally benefited, that, as a rule, property fronting upon a street, foot by foot, will be of equal value, and should, therefore, be equally assessed." This rule was first enunciated in the case of Palmer vs. Stumph, 29 Ind.,

329, particularly at page 337. This rule needs only to be stated to show how unjust it is, and the Supreme Court of Indiana, in its decisions, has upheld this view only "on the *assumption* that the property affected is equally benefited."

The Barret Law was not conceived or formulated with the idea of benefit to specific property abutting on the street to be improved. Nowhere in section 6, the one which provides for the engineer's final estimate, is the idea of a benefit arising from a street improvement, special or general, set forth in the six items which the estimate concerning such street improvement is to cotain, they being:

"*First.* The total cost of said improvement;

Second. The average cost per running foot of the whole lenth of that part of the street or alley so improved.

Third. The name of each property owner on that part of the street or alley so improved;

Fourth. The number of front feet owned by the respective property owners on that part of the street so improved;

Fifth. The amount of such cost for improvement due upon each lot, or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiylying the average cost price per running foot by the number of running front feet of the several lots or parcels of ground respectively;

Sixth. The full description together with the owner's name of each lot or parcel of ground bordering on said street so improved."

The next section (7) provides for a notice of the final hearing upon such report before a Committee of the Common Council to be appointed for that purpose, but a careful examination of this section fails to disclose any way, manner, method, place, or right to challenge the report on the ground of benefits, or lack of the same, or on the ground of damage. This section has been construed by the Appelate Court of the State of Indiana in Sands vs. Hatfield, 7 App., 361, where the Court says: "We recognize that such statutes are strictly construed, but, in the application of this rule, such construction should be reasonable, so as to give force and effect to the intent and spirit of the Legislature. The reason for the notice,

and the power conferred, as provided in this section, evidently was to give an opportunity to correct such omissions and mistakes, in order that the assessments should be made equal and fair upon the property of all the persons who received and enjoyed all the benefit of the improvement," and in this construction only "omissions and mistakes" are to be corrected. This HEARING IS LIMITED TO SUCH COMMITTEE AND THE COMMON COUNCIL, and the Common Council shall assess against the several lots or parcels the amounts to be assessed. No hearing is to be had by any tribunal than the one which ordered the improvement. (Sec. 7)

By agreeing in writing to waive all objections on account of illegality or irregularity as to their respective assessments, which agreement is spread of record, the right to pay the same in ten annual installments is granted. (Sec. 7.)

By this section the manner of assessments is left entirely to the discretion of the Common Council or Committee. No duty is imposed, simply a discretion given. No rule of assessment is prescribed. The matter is left to the unbridled discretion of the Council. There is not word limiting them to an assessment by the square foot or any other method, or according to benefits; in fact no rule, whatever, is prescribed. A greater power is given to the Common Council than has been given to any court inquiring into kindred matters. In fact, by the only analysis of this section which can be made, the Committee and the Common Council, together, are made the final arbiter on the assessment. (Sec. 7.)

By section 10 an appeal to the Circuit Court is provided but the plaintiff in error is denied the right to any inquiry by a court into the benefits or damages resulting to her property by reason of such improvement. "The trial of such appeal shall be conducted as other trials of civil causes are conducted in said courts: *Provided: That no question of fact shall be tried which may arise prior to the making of the contract for said improvement under the order of the Council. And in case the court and shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then the court shall direct*

the said property to be sold, etc. * * * * * * * Provided that nothing herein shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of such improvements." (Sec. 10.)

ARGUMENT.

The only warrant for a special assessment against abutting property for the payment of a street improvement, is that the benefit must be equal to or exceed the assessment. When the benefit equals or exceeds the cost it may be public policy that an assessment for the improvement may be made. In a new country it is natural that there should be a desire for public improvements, and that courts should lend their aid to this end. But the desire for public improvements, like many another desire, requires a very prudent supervision. It is only necessary to recall the history of the Internal Improvement period of 1830 to 1840 in Indiana to be convinced of the evil results attending such legislation.

"Special assessments are a peculiar species of taxation standing apart from the general burden imposed for State and municipal purposes and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the person taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make

it, while they are supposed to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby. their property being increased in value by the expenditure to an amount at least equal to the sum that they are required to pay. This is the idea that underlies all these levies."

Cooley on Taxation, 2nd Ed., 606.

Brewer, J.: "Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. * * *

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement."

Illinois Cent. R. R. vs. Decatur, 147 U S. 197.

"To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement, is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability on the part of the community to confisicate, for its own purposes, the property of the citizen."

Tidewater Co. vs. Coster, 18 N. J. Eq., 531.

The City of Huntington having adopted a valuation

on real estate in a city for the purpose of taxation, when the law requires that it shall be listed for its cash value, fixes its cash value, and if after an improvement has been made to a street on which the real estate abuts, a new valuation of such real estate for taxation is made, according to law, which new list does not materially change the value from what it was before the improvement of such street was made and the assessment for such improvement is materially in excess of such increase in valuation for taxation, such excess is a taking of property by law without compensation therefor, and works an appropriation and confisication of such real estate. The plaintiff in error respectfully urges that just such a state of facts exists in this appeal.

By reference to the record, pages 79 to 82 inclusive it will be seen that the real estate of the plaintiff in error abutting on said street was listed for taxation in the year 1891, by the assessor of Huntington Township, and that such assessment was adopted by the City of Huntington and placed on her tax duplicate. That during the year 1894 said improvement was completed, and that in 1895 a new valuation according to law, was made by the assessor of Huntington Township and this list was adopted by the City of Huntington and placed on her tax duplicate. The said lists are as follows:

No. Lot.	List 1891.	List 1895.
11	$280.00	$295.00
13	210.00	215.00
14	205.00	210.00
15	200.00	205.00
16	125.00	130.00

The largest increase was on lot No. 11, being $15.00 A reference to the record, page 35, shows the cost of the improvement assessed against each several lot to be $149.00, an excess of the cost of the improvement over the increase in valuation on each several lot of from $134.00 to $144.00, and a sum $19.00 larger than the whole valuation of lot No. 16 in 1895, a year after the street had been finished.

With all due regard for the Barrett Law, if such an assessment—$149.00 to each lot—is not confisication pure simple and undefiled, the plaintiff in error is unable to define what confisication would be. While the valuation of the lots for taxation on the tax duplicate of the City

of Huntington may not be absolutely correct as to their cash value, yet it does certainly furnish an equitable, honest, basis to measure the benefit derived from the improvement and in this case shows the improvement to be absolutely without appreciable value to them and that the assessment is a taking and depriving the plaintiff in error of her said lots without any return therefor and works a confisication of them.

It has been said by this Honorable Court in the case of French vs Barber Asphalt Paving Co., 181 U. S. 324, 45 L. ed. 879, that the matter of street improvements, by paving, was within the scope of the taxing power of the States and therefor not in contravention to the Constitution of the United States and particularly the 14th Amendment, "but that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceeding, to deprive a person of his life, liberty, or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceeding in the case of Norwood vs. Baker." We earnestly submit that such is the case in this appeal. Here the "Star Chamber" proceeding of a Committee of the Common Council of the city, or the Common Council of the city, could and did levy on the property of the plaintiff in error a final assessment ten times greater than the increase in valuation of her said lots and $19.00 greater than the whole assessed value of her lot No. 16 one year after the improvement of the street by said pavement had been made. Here a Common Council, elected, as it necessarly must have been, through party strife with none of the prerogatives of a court, with none of itsimpartiality, moved by all of the prejudice engendered by the necessary opposition of the plaintiff in error to the improvement, and with the tenacity of a partisan to force the plaintiff in error to submit to its decree—a predujice and partisanship so fierce that when the plaintiff in error presented her objections to the improvement, the Common Council of the City of Huntington refused to hear them, and treated them simply as a communication and ordered them placed on file, (see record page 25) comes into this court and by the demurrer says, "yes we admit all this, and all that you say, but French vs. The Barber Asphalt Paving Co. establishes our contention, and con-

fisication is right, honest, just and constitutional. And therefor you must pay the assessment or lose your property."

While as a general rule the matter of street improvements may be within the scope of the taxing power in the several states, yet the general taxing power in the several states is limited in its rate, and municipal bodies can act only within those prescribed limits. In Indiana the rates are specifically set forth as follows: road taxes Sec. 6834 R. S. 1901; county taxes Sec. 7921-7922; township taxes Sec. 7921-8922 and 8070-8085 a; tax levy to support the poor Sec 8165 n, 8169; State tax Sec. 5951. In the last instance the limit is sixteen cents on each one hundred dollars of taxable property real and personal and fifty cents on each taxable poll. Suppose the Legislature of Indiana should fix a rate of $114.00 on each one hundred dollars of taxable real property would this court on a proper case presenting such facts say that the "State tax" is withinthe scope of the taxing power of the several States and will not be interfered with, or declared to be in contravention to the Constitution of the United States and the 14th Amendment thereto? And yet in this case a similar proposition confronts this court in the matter of the assessment of the William Street improvement against the property of the plaintiff in error, if any other rule is enunciated than that the assessment must be limited by the benefit to be received. All of the Sections referred to in this paragraph are statutory and are subject to change by the Legislature, but will it be contended for a moment that the general laws of taxation may be changed in such a way that the probable and usual method of their execution will result in the confisication of property? And if such laws should be enacted is it within the province of the States to say to the Courts of the United States "Hands off! this is our affair!"

The Supreme Court of Indiana by a majority decision has declared that the Barrett law is constitutional and not obnoxious to the Constitution of the United States and the 14th amendment, but the plaintiff in error respectfully submits that said law is unconstitutional and that the Supreme Court of the United States ought to reverse the said judgment. The decision in this cause was a memorandum decision and was affirmed on the authority

of the decision in the appeal of Adams vs. City of Shelbyville 154 Ind. 467; and a certified copy of that opinion has been made a part of the record in this cause, (see Record page 107 to 157.)

We desire to quote the opinion of the court in this cause, practically in full. It is found at page 99 of the record and it is certainly unique, the italics are ours:

BAKER, J: "As the ground for reversal, appellant contends that the 'Barrett law' is unconstitutional. The *majority of the court* held otherwise in Adams vs. City of Shelbyville, 154 Ind. 467, on the authority of that decision the judgment is affirmed. It is therefor considered by the court that the judgment of the court below in the above entitled cause, be in all things affirmed, at the cost of the appellant." * * * * This decision was rendered on the 17th day of April, 1901. Read in the light of the fact that Judge Baker rendered the dissenting opinion in the case of Adams vs. The City of Shelbyville, a careful reading of this decision will show what was evidently in the mind of Judge Baker when he wrote this opinion. The plaintiff respectfully urges that Judge Baker in his said dissenting opinion has voiced the true expression of the law as it really is and that the "Barrett law" is unconstitutional.

In order to hold the "Barrett law" constitutional, the law was such, that the Supreme Court of Indiana was forced to make constructions of the statute which were not in harmony with the sense of justice of the people of the State of Indiana, for at the first succeeding session of the General Assembly of the State of Indiana an entirely new law on the subject of street and sewer improvement was enacted and the Barrett law repealed. A copy of said law is attached to and made a part of this brief as appendix "A."

Judge Baker so appositely expresses the contention of the plaintiff in error on this point that we quote from his opinion: "Judicial construction is not an unbridled force, operating this way in one case and that way in another, according to caprice or what courts may think would be good legislative judgment. The function of judicial construction is, not to hold statutes constitutional but to determine the meaning of statutes. If it is found that the legislature has acted within the scope of its powers, courts should let the act alone whether they deem

it wise or not. If it is found that the legislature has usurped power and invaded the reserved rights of the people, it should be the duty of the courts rigorously and jealously to uphold the rights of the people, even if they think the legislature ought to have the power it attempted to exercise. The first business of the courts is to ascertain judicially the meaning of the statute. Whether the statute is constitutional or unconstitutional cannot be determined until the meaning of the statute is first determined. And that meaning should be determined according to rules of law that the courts should uniformly follow. If courts recognize no rules in declaring the legislative intent, or disregard the lawful order of applying recognized rules, the people, the bar and the inferior tribunals would have no means by which to make even a fair guess at what would finally be declared to be the law. If there is no law to control courts' interpretation of law, as well might there be no law at all. *Non licet judicibus de legibus judicare, sed secundum ipsas.* 154 Ind 498.

Under any construction of the law as to the hearing, and as to determining the amounts of the assessments other than that set forth in the final report of the engineer the method proposed would be so fraught with uncertainties that no committee or common council would risk the uncertainty of such other method. None of the methods suggested by the court could be self executing. We again quote from Judge Baker: "It is axiomatic that the constitutional provision authorizing the levy and collection of taxes is not self-executing. It is fundamental that the provision can not be made operative by the executive department, nor by the judicial department, but only by the legislative department. It is elementary that the power must be carried into execution by appropriate legislation and that no taxing bodies or officers can make a valid assessment unless they follow with substantial strictness the precise method prescribed by the statute. If the constitutional provision be read into the statute , it is not perceived how the situation is changed. If the provision is not self-executing as it stands in the Constitution, it is not self executing when read into the statute. If it cannot rightfully be put into operation by the judicial department as it stands in the Constitution, it cannot rightfully be put into operation by the judicial department when read into the statute.

If it can only be carried into execution by appropriate legislation as it stands in the Constitution it can only be carried into execution by appropriate legislation when read into the statute. The appropriate legislation necessary to put into execution the constitutional provision for taxation, by the method of limiting assessments to actual benefits in street improvement cases, cannot be supplied by the judicial department; it seems to me, without going outside its proper limits.

"The constitutional provision that "no man's property shall be taken by law without just compensation" is likewise not self-executing. It is a negative provision,—an inhibition. If the constitutional provision be read into the statute, what is accomplished? If it is only a negative provision, an inhibition, as it stands in the Constitution, it is only a negative provision, an inhibition, when read into the statute. If affirmative legislation is needed to enable a city to act under the provision as it stands in the Constitution, affirmative legislation is needed to enable a city to act under the provisions when read into the statute. In the place of the established principles for ascertaining judicially the legislative intent, substitute the following formula: Take a statute in which the only method prescribed for fixing assessments is by frontage regardless of actual benefits; read into this statute the constitutional inhibition of the laying of assessments by that method; delete from the statute all that conflicts with the inhidition; and amend the statute by adding thereto all the affirmative legislation that is needed to prescribe a method of apportioning and limiting assessments according to special benefits actually received. In other words: Take a piece of paper and erase what is on it so that it becomes a blank; then write upon it the necessary directions by which a constitutional provision that is not self-executing can be executed." Ibid, 526. This we respectfully submit was what was done in order to give the "Barrett law" a semblance of constitutionality.

Even if such were the intent of the legislature it ought to have been expressed in language that would not have necessitated the extreme limit of interpretation used by the majority of the court, and with the construction conceded, which the majority of the court has announced, we still contend that the law is unconstitutional and in con-

travention to the 14th Amendment in this, that the tribunal which is to pass upon and decide the assessment is either the Common Council or one of its Committees. See Sec. 7. Again we quote from Judge Baker's opinion: "The contract is made between the contractor and the council for the city. Under the Barrett law as enacted, the liability of the city was limited to the cost of street and alley crossings; and under section seven the council had no discretion, and no duty but to see that the balance of the cost was properly apportioned among the property owners according to frontage. The council, for the city, has control of the expenditure of the general fund; but, under the Barrett law as enacted, no conflict of interest arose among the council and the property owners and the contractor. Under the Barrett law as construed, however, a three-cornered conflict of interests at once arises, and the council is made the exclusive and final judge in its own case. In Board, et al vs. Heaston, 144 Ind. 583, 55 Am. St. 192, it was held that a board of county commissioners in allowing or disallowing claims against the county acted merely in the capacity of an auditing committee. The court said: 'If it was a suit against the county for the recovery of money in the sense urged by counsel, then the claimant was the plaintiff and the county the defendant, and the commissioners were in the discharge of a double duty; acting as a court, and also as the representative of the defendant, or otherwise the county could not be said to be in court. Such a construction as contended for leads to an absurdity. It would follow that the court and the party defendant were virtually the same. It is an axiom of the law that no man can be a judge in his own case.' A proper method of giving the people "due process or law" is illustrated in our statute in reference to the opening of streets. In that statute it is recognized that the general treasury will be subjected to an indefinite liability, and the city is not made the exclusive and final judge in its own case.

On the whole, it seems to me that my breathren in steering away from the rock of Scylla have plunged into the whirlpool of Charybdis."

In this cause the Common Council and its committees refused to hear any testimony from any person except a property owner on said William street. See Record page 74. Such testimony would in all probability not be

disinterested. One who has made up his own mind to pay, can easily make up his mind that his neighbor should pay too, and still be a good citizen. There are so many motives of interest at work in his mind and which he may be unconscious are selfish, which are still strong enough to bias his judgment.

An examinafion of Sec. 10 shows that no remedy is saved to the plaintiff in error whereby she may, in any court, defend her rights and save her property from confiscation. The apparent remedies of injunction and appeal when scrutinized show that the right to injunction is given before she can know or estimate what the damage may be, for the cost of the improvement cannot be known during any part of the time the right to enjoin is given to her, and the right to appeal eliminates, by its very terms, inquiry into everything that will avail her in her effort to secure her rights and defend her property.

Again; if either the "Barrett law" as enacted, or the "Barrett law" as construed is to be considered, the conclusion that it is unconstitutional and in contravention to the 14th Amendment is the logical one. For in this cause real estate worth $20.00 per front foot was not assessed for any more than that of the plaintiff in error which was worth from $1.96 to $4.47 per front foot, and that too, on a valuation made after the improvement was completed. It is not within the province of a legislature to enact a law, the usual working of which, would produce such a hardship. For "the legislature, in the plentitude of its taxing power, cannot have constitufional power, to exact from one citizen, or even one county, the entire revenue of the commonwealth. Such an axaction, by whatever the legislature might choose to call it, would not be a tax, but would undoubtedly be the taking of private property for pudlic use, and which could not be done constitutionally without the consent of the owner, without retribution of the value in money."

Hammett vs. Philadelphia, 65 Pa. St., 152.

"In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law making power to concentrate the burden of a tax upon specified property, does not exist.

* * * * It follows, then, that that these local assessments are justifiable on the ground above, that the locality is especialiy to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on normal and legal grounds; and yet there is no difference between such an extortion and the requisition upon a land owner to pay for a public improvement over and above the ecceptive benefit received by him."

State vs. Newark, 37 N. J.Law, 415.

The danger is not that the courts of the United States will trascend the limits of the jurisdiction to declare State laws unconstitutional, but that legislatures will over-step the limits bounding them in the making of laws. Hon. James C. Carter in a brief in this court in the case of Smyth vs. Ames, coming up from the Circuit Court of the United States for the District of Nebraska well said: "In England, without written constitutional safeguards, the defense of fundamental rights is left to Parliament, and that body consequently feels the full responsibility of the trust, and its abstention from any invasion of them has become a tradition which operates as an effectual safeguard. But in this country that defense is entrusted to the higher courts, and the consequence is that legislatures do not feel the sense of responsibility. They pass laws and say that whether they are constitutional or not is no concern of theirs, that if any one claims that constitutional rights are invaded, they must assert their claim before the judicial tribunals, and the sad spectacle is coming to be witnessed, of legislators, both in the States and in Congress, deliberately contriving, not how they may keep within the just boundaries of legislative power, but how they may pass measures which they know are really beyond those boundaries, by so framing them as to avoid and evade judicial condemnation."

Perhaps there is no power exercised in the government of the people of the United States reserved more exclusively to the States and their jurisdiction than the police power. In its very nature it is local in its exercise. The duties imposed are those which most intimately touch

and regulate mankind in their home and local life, and this honorable court has decided that the police power is peculiarly a State power to be exercised by the machinery of State government and that the legislature may enact such laws as are necessary for its exercise; and yet in the case of Lawton vs. Steele 152 U. S. 137. L. ed. 38, page 388, Mr. Justice Brown rendered the opinion, the Court said: "The legislature may not under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring a master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give bond for every passenger so reported conditioned to indemnify the State against any expense for support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. Henderson vs. Wickham 92 U. S. 259 [23 L. ed. 543.] A similar statute of California requiring a bond for certain classes of passengers discribed, among which were "lewd and debauched women," was also held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. Chy Lung vs. Freeman 92 U. S. 275, [23 L. ed. 550.] So in Hannibal & St. J. R. R. Co. vs. Husen 95 U. S. 465. [24 L. ed. 527,] a statute of Missouri which prohibited the driving of Texas, Mexican or Indian cattle into the State between certain dates in each year was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police powers of a state, though it was admitted that the State might, for its self protection prevent persons or animals having contagious diseases from entering its territory. * * * In all thesecases acts were held to be invalid as involving an unnecessary invasion of the rights of property, and inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to public interests."

And Chief Justice Fuller in his dissenting opinion in said cause stated the principle in these words: "The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited by the alleged violation of law by its owners, nor destroyed by way of penalty inflicted upon him without opportunity to be heard."

Ibid. 144 [38 L. ed. 391.]

The regulation of railroad charges for the transportation of passengers and freight falls within the police power of the State and the police power is as exclusively a local power as that of taxation.

R. R. Co. vs. Fuller, 17 Wall, 560, 21 L. ed. 710.

But the Supreme Court of the United States has decided that the power of regulation or limitation cannot be exercised without limit. Chief Justice Waite in the case of Stone vs. Farmer,s Loan and Trust Co. 116 U. S. 331, 29 L. ed. 644 said: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under a pretense of regulating fares and freights the State cannot require a railroad corporation to carry passengers or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In the case of Chicago M. & St. P. R. R. Co. vs. The State of Minnesota, 134 U. S. 418-466, 33 L. ed. 981, Mr. Justice Blatchford in rendering the opinion, in part said: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

By the second section of the Statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property, shall be

equal and reasonable. Under this provision, the carrier has the right to make equal and reasonable charges for such transportation. In the present case the return alleged that the rate of charge fixed by the Commission was not equal or reasonable, and the Supreme Court held that the Statute deprived the Company of the right to show that judicially. The question of reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigtion by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the Company is deprived of the equal protection of the laws."

Permit the plaintiff in error to paraphrase the first paragraph of the above quotation from Mr. Justice Blatchford with special reference to the "Barrett law."

It [the Barrett law] deprives the plaintiff in error of her right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of the Common Council or a Committee theaeof which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

The case of Smyth vs. Ames 169 U. S. 466, 42 L. ed. 819 among other things decides that the power given by the Constitution of Nebraska to its legislature to fix rates for transportation cannot be exerted in derogation of rights secured by the Federal Constitution; that a railroad corporation is a person within the 14th Amendment forbidding a State to deprive any person of property without due process of law, or to deny any person the equal protection of the laws; and that "while rates of transportation of persons and property within the limits

of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefor without due process of law, cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

The plaintiff in error respectfully suggests that the reasoning on all the cases herein concerning the police power of the States is apposite to her cause and that her rights as a person are of as high and sacred an order as the rights of a railroad company. And she most respectfully and yet urgently prays the Supreme Court of the United States to decide that the "Barrett law" is unconstitutional and in contravention to and obnoxious to the Constitution of the United States and the 14th Amendment and that the judgment of the said Supreme Court of the State of Indiana in this cause be reversed and such directions be given that full course and efficacy may inure to the plaintiff in error by reason of defenses set up in her original answer filed in said cause and in each separate paragraph therein contained.

All of which is respectfully submitted,

SAMUEL M. SAYLER, of
Counsel for the plaintiff
in error.

C. W. Dudley
L. T. Michener
of Counsel

APPENDIX "A."

AN ACT providing the mode and manner of making street, alley and sewer improvements in cities not operating under special charters, providing for the mode and manner of assessing the costs thereof, the manner of enforcing the payment of the same, authorizing an appeal from such assessments, and repealing all conflicting laws and parts of laws, and especially an act approved March 8, 1889, popularly known as the "Barrett Law," in so far as the provisions of said Act apply to cities not operating under special charters, but not as to towns.

[H. 358. Approved March 11, 1901.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That when the common council of any city, not operating under a special charter, desires to make any street, alley or sewer improvement, it shall order the same by the adoption of a resolution declaring such improvement to be necessary and stating the kind, size, location and terminal points thereof and fixing date upon which bids will be received for the construction of said improvement. Such resolution shall be adopted only by the vote of at least two-thirds of the members of such common council. Such common council shall give notice of the letting of such contract by three weeks' publication in a newspaper of general circulation published within the city, and may provide what indemnity bidders must file with their bids to insure the execution of the contract. The common council shall open the bids upon the date fixed and award the contract to the best bidder therefor: *Provided*, That such common council may take such bids under advisement and shall have the power to reject any and all bids: *Provided*, That nothing herein contained, shall prevent any property owner whose lands shall be assessed for the improvement of any street, to remonstrate against said improvement at any time before the letting of the contract, and if the remonstrance is signed by two-thirds of the property owners, residing upon the lots abutting on such improvement, and representing two-thirds of the number of lineal feet of such improvement, then all further proceedings shall be abandoned.

SEC. 2. Upon the acceptance of any bid as provided

for in Section one of this act the successful bidder shall enter into a written contract for the faithful execution of such work and give bond in double the amount of the contract price with surities to the approval of said common council to secure the performance of said contract and to hold such city harmless from the payment of any debt or damages by reason of the act of such contractor and to secure the payment of all claims for labor and material used in such improvement.

Sec. 3. Upon the completion of such work, the City Civil Engineer shall roport such fact to the common council and shall also report the cost of such improvement. The common council shall thereupon, by resolution, refer said matter to the City Commissioners of said city and fix a time and place for the meeting of said City Commissioners. The City Clerk shnll issue a notice to the City Commissioners, notifying them of the time and place and object of their meeting, and the City Marshal shall serve said notice as a part of his official duty without extra compensation. Such City Commissioners shall meet at the time and place fixed by said common council and shall proceed to view the lots, lands and parcels of ground affected by said improvement, and within fifteen days thereafter file with the Clerk of said city their written report, describing therein each lot, tract of land or parcel of ground benefited or damaged by said improvement, together with the name of the owner thereof. At the next meeting of common council of such city such common council shall fix a time and place where such City Commissioners will meet to assess the costs of said improvement upon the property benefited thereby in proportion to the benefits derived therefrom, but not in excess of such benefits, and the City Clerk shall give notice by two weeks' publication once a week in a newspaper of general circulation printed and published in said city, of the time and place of the meeting of such City Commissioners, and shall state in said notice the name of each person whose property has been reported as benefited or damaged by said improvement. The City Commissioners shall take notice of the time fixed for such meeting, and shall meet at such time and place without further notice. All persons shall have the right te appear before such Commissioners at such time and place and have a hearing as to the benefits or damages to their respective lots, tracts of

land or parcels of ground. Should such Commissioners conclude upon such hearing that any lot, tract of land or parcel of ground not included in their report, has been benefited or damaged by such improvement, after having caused the city clerk to issue a notice to the owner of such property, fixing a time when he may be heard before such City Commissioners, and to be served by the City Marshal five days before the time fixed for his appearance, if such owner be a resident property owner of the county wherein such lot, tract of land or parcel of ground is situated, or if such owner be not a resident of such county, then by the publication of such notice for ten days in a newspaper of general circulation printed and published in such city, they may include such property in their assessment of benefits or damages. Such City Commissioners shall make a written report of their assessment of benefits and damages to the common council within thirty days after the time fixed for their meeting to make such assessment. All persons owning lots, tracts of land or parcels of ground, reported as benefited or damaged,shall take notice of the filing of such report and shall have the right to appear before said common council and have a hearing thereon: *Provided*, That if any such Commissioner owned real estate along the line of improvement, or be of kin to any person owning real estate along the line of said improvement, he shall be ineligible to act as to said improvement, and the common council shall appoint a Commissioner in his stead.

SEC. 4. Within twenty days after the filing of the report of the assesment of benefits or damages by the City Commissioners, the common council shall act upon said report at a regular or special meeting thereof, of which ten days' notice shall be given by publication in a newspaper of general circulation in such city, setting forth the location and terminal points of such improvement and the date of the filing of the commissioners' report, provided for herein, and reciting the time and place at which such common council shall meet for the purpose of confirming or modifying the assessment made by such commissioners and that any person interested may appear thereat and make objection to such confirmation or modification. At such meeting the common council shall give opportunity for hearing to all parties interested, as to any objection they may have to such assessment, and may approve

said report as filed, or may change or amend said report as to the assessment of property; and the adoption of said report as made by the city commissioners, or as changed or amended by the city council shall constitute the assessment of benefits or damages for such improvement and the several amounts therein set out as assessments against the respective lots, tracts of lands or parcels of ground shall be liens thereon from the date of such action by such common conncil and shall thereafter bear interest at the rate of five per-centum per annum. After the assessments, as herein provided, has been made by the common council, no suit shall lie to enjoin or restrain the collection thereof, and the validity of such assessment shall not be questioned, except on appeal as herein provided for.

SEC. 5. Any person owning any lot, tract of land or parcel of ground, upon which benefits or damages have been assessed, may appeal to the Circuit Court of the county from the action of such common council, within twenty days thereafter by filing with the city clerk a written understanding with surety to the approval of said clerk, conditioned that he will duly prosecute said appeal and pay any and all costs that may be adjudged against him, and filing therewith a statement of his grievances, to-wit:

First. That the proceedings for said improvement are invalid.

Second. That the benefits assessed to his or her property are too high or damages too low.

Third. That the benefits assessed to his or her prop- are too high in proportion to the benefites assessed against other property similarly situated. The city clerk shall thereupon make and file with the clerk of such court a transcript of such proceedings. Such appeal shall be tried by the court without the intervention of a jury and no question shall be tried on appeal except the grievances set out in the statement of the aggrieved party filed with the city clerk. If the party appealing fail to reduce his assessment of benefits or to increase damages assessed ten per cent. he shall pay the costs of such appeal. All persons owning property assessed shall take notice of such appeal and shall be bound by the judgement of the court. The Court shall have power on such appeal to reduce the assessment of the party appealing and to modify

and equalize the entire assessment so as to make the assessments conform to the benefits derived from the improvement. In the event there is a reduction in the amount of benefits or an increase of the damages in the sum of ten per cent., then the city shall pay the costs of such appeal.

SEC. 6. The assessments, as made, together with the interest thereon, shall be a lien upon the several lots, tracts of land or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in ten equal annual installments in the same way that taxes are collected. Such assessments shall be placed upon the city tax duplicate and charged against the several lots, tracts of land or parcels of ground as follows: Ten per cent. for each successive year for ten years, to which several amounts shall be added and placed on the duplicate, interest at five per cent. per annum, payable semi-annually, which shall be caculated from the date of said assessment until the several installments fall due; and the first ten per cent. of said assessments shall be due and payable when the first city tax falls due and is payable after such assessment is made. If any installment of said assessment shall become delinquent the same penalty shall be added thereto as to delinquent taxes, and such delinquent installments shall be collected in the same manner that delinquent taxes are collected, or may be collected by foreclosure of the lien thereof in any court of competent jurisdiction, as a mortgage is foreclosed. Such action of foreclosure may be brought by such city or by the holders or owners of any of the bonds hereinafter mentioned who shall recover in addition to the amount of such bonds and interest and all costs, a reasonable attorney's fee. When such assessments have been made, the common council, for the purpose of anticipating their collection, may provide by ordinance for the issue of improvement bonds, which bonds may be delivered to the contractor in payment for the work, or may be sold for cash at not less than par value, as the common council may direct. The proceeds arising from such bonds shall be applied exclusively to the payment of the cost of the improvements in this act mentioned. Said bonds shall bear the name of the street or alley improved, or the sewer constructed, and shall be payable in installments as nearly equal as may be, out of the assessments hereinbefore

provided for, the first installment of bonds to be payable on the first day of July following the date upon which the first installment of assessment is payable, and the remaining bonds in one, two, three, four, five, six, seven, eight and nine years thereafter, provided that it be lawful to provide that such bonds shall not become due until some subsequent date not later than the 31st day of December next succeeding the date upon which the respective installments are due and payable. Such bonds shall be in denominations of $100 or a multiple thereof, except that the first bond in each issue may be fractional, and shall bear interest not to exceed five percentum per annum, payable annually or semi-annually, as evidenced by the coupons to be attached to such bonds. Any person may pay the whole assesment against any lot, tract of land or parcel of ground, or any installment thereof, with interest up to the date of the payment, at any time before said bonds are issued, and may make payment thereof at any time after said bonds are issued, provided interest thereon be paid up to the date at which the next installment is payable. Whenever any payment shall be made upon such assessment, it shall be the duty of the City Treasurer to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment; and if said payment be in full of all principal and interest to the next interest paying date, said payment shall be a complete discharge of said assessment. On or before June 1st of each year the Treasurer of any city issuing bonds hereunder shall ascertain the amount of such assessment collected and applicable to the payment of such bonds and to determine the particular bonds, beginning with the lowest number, which shall be paid therefrom, and shall give notice in some newspaper published in such city, that such bonds, describing them by number and by the assessment to which they relate, will be paid at the place of payment named in such bonds, on the 1st day of July next following. And thereupon, from and after such 1st day of July, said bonds shall be payable at such place, on demand, and no further interest shall accrue thereon.

SEC. 7. In the event the assessment of benefits as hereinbefore provided shall not be sufficient to pay the contract price for the improvement, then and in that event the difference shall be paid by the city in cash out

of its general fund. And whenever such improvement or part thereof is had or made in any city, opposite to any property owned by such city and the same is benefited, the cost of such improvement shall be paid according to benefits assessed as hereinbefore provided, in cash out of the general fund of the city, immediately upon the completion of the work and the ascertainment of benefits as herein declared.

SEC. 8. The word "benefits," as used in this act means special benefits peculiar to the property as assessed, as distinguished from general benefits to the city at large.

SEC. 9. That all laws and parts of laws in conflict herewith be, and the same are hereby repealed, and especially is an act approved March 8, 1889, popularly known as the Barrett law, repealed in so far as the provisions thereof apply to cities not operating under special charters but not as to towns.